UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE: REALPAGE, INC., RENTAL SOFTWARE ANTITRUST LITIGATION (NO. II)	**Case No. 3:23-MD-3071** **MDL No. 3071** **Chief Judge Waverly D. Crenshaw, Jr.** **This Document Relates to:** **3:23-cv-00332** **3:23-cv-00357** **3:23-cv-00378** **3:22-cv-01082** **3:23-cv-00979** **3:23-cv-00410** **3:23-cv-00413** **3:23-cv-00440** **3:23-cv-00552** **3:23-cv-00742**

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS MULTIFAMILY PLAINTIFFS' SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

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Despite having yet another chance to amend—their "last and forever opportunity" (ECF 499 at 14:20–22)—Plaintiffs still cannot connect any Defendant to any supposed horizontal conspiracy. Plaintiffs instead double down on the same implausible theory that was in their prior complaints: that Defendants' mere use of RealPage RMS makes them conspirators, without regard for when or why Defendants licensed any of the three products or how they were used. As Defendants observed previously, Plaintiffs have not cited a single case in the Sherman Act's history that finds a "conspiracy" on similar facts or anything remotely close. Indeed, last month another court dismissed a complaint (filed by the same counsel representing Plaintiffs here) that alleged hotels in Las Vegas were conspiring to fix prices merely because they use revenue management software. *Gibson v. MGM Resorts Int'l*, 2023 WL 7025996, at *3–4, *6 (D. Nev. Oct. 24, 2023). This Court should do the same, and dismiss with prejudice.[1]

I. ARGUMENT

A. Plaintiffs Concede They Have Engaged in Group Pleading

Plaintiffs admit that the SAMC must include "enough factual allegations to *connect each* defendant to *the conspiracy*." Opp. at 27–28 (emphases added). They claim they have satisfied this standard—and alleged "detail for each Defendant"—in a span of almost 130 paragraphs in the SAMC. *Id.* at 27. Those paragraphs, however, repeat the same six allegations nearly verbatim for each Lessor Defendant and concern each Lessor Defendant's *vertical* agreement with RealPage to license one of its RMS products. *See* SAMC ¶¶ 67–193. Plaintiffs never allege what any Lessor Defendant supposedly did to join a *horizontal agreement* with its competitors to fix prices. *Id.*

[1] Due to Plaintiffs' voluntary dismissal of 45 named plaintiffs whom they did not name in this MDL (*see* Dkt. No. 563), only 12 of the 43 actions originally consolidated into this MDL remain—10 actions related to the multifamily complaint and two actions related to the student housing complaint.

And Plaintiffs' reliance on putative "public statements from . . . Defendants confirming the nature and effect of the agreement" does not help. Opp. at 27. None of the statements alleged—which concern only a handful of the 49 Lessor Defendants' dealings with RealPage—hints at any price-fixing agreement among Lessor Defendants.

Lacking plausible factual allegations showing the requisite "meeting of the minds" among Lessor Defendants (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)), Plaintiffs try a different tactic: they argue mere "use of RealPage RMS products to set prices demonstrates a conscious commitment to participate in the cartel." Opp. at 29. In other words, simply using RealPage RMS after 2016, without anything else, is equivalent to joining a cartel—even if a lessor was using it before 2016 as a legitimate "advisory product" (SAMC ¶ 212), and regardless of how "actively" a lessor accepted its pricing recommendations after 2016 (Opp. at 20). This is group pleading at its worst. And it ignores the software's many unilateral benefits that incentivize an individual lessor to license it—benefits that Plaintiffs acknowledge existed before 2016. Mot. at 6–7.

Gibson v. MGM Resorts International—which Plaintiffs bury in a misleading, cursory footnote—confirms the SAMC's failings. Opp. at 29 n.27. That case challenged hotels' use of revenue management software. Plaintiffs claim the court dismissed that case "for failing to allege that the defendant's algorithm used sensitive information." *Id.* In reality, the court found that the plaintiffs failed to allege "what software Hotel Operators all agreed to use, who entered into any purported agreement, and when they entered into any agreement." *Gibson*, 2023 WL 7025996, at *4. The same is true here, and the SAMC should be dismissed for the same reason. Mot. at 6–7.

Nor do *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), *Toys "R" Us, Inc. v. FTC* ("*TRU*"), 221 F.3d 928 (7th Cir. 2000), or *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), save Plaintiffs. Plaintiffs do not address Defendants' arguments about these cases, in which

a handful of competitors engaged in the same conduct that was contrary to their individual interests after receiving specific and contemporaneous communications about doing so. *See, e.g.*, *Interstate*, 306 U.S. at 222–23. The Sixth Circuit highlighted these distinctions in *Travel Agent*, rebuking plaintiffs there for "fail[ing] to acknowledge the salient evidence of unlawful collusion presented in *Interstate*." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 906 (6th Cir. 2009). Such evidence is missing here. Indeed, Plaintiffs concede that the use of RealPage RMS comports with each Lessor Defendants' unilateral interests (*see* Mot. at 12–13) and base their claims on public marketing materials emphasizing that RealPage RMS sometimes recommends reducing prices. *See, e.g.*, ECF 594-1 (Whittaker Decl. Ex. A) at 3–4. *Interstate*, *TRU*, and *Apple* also involved "an abrupt shift from the past." *TRU*, 221 F.3d at 935. But Plaintiffs' charts here show the opposite: *no change* before and after 2016, when the alleged conspiracy supposedly began. *See, e.g.*, SAMC ¶ 22 fig. 2. And unlike the powerful "ringmaster" hubs in those cases (*TRU*, 221 F.3d at 934), Plaintiffs concede not only that RealPage cannot force Lessor Defendants to accept price recommendations, but also that Lessor Defendants often reject them. Mot. at 5, 23–24. *Interstate*, *TRU*, and *Apple* are thus distinguishable, as are the other cases Plaintiffs cite.[2]

B. Plaintiffs Plead No Direct Evidence of Conspiracy

Plaintiffs allege no direct evidence of a horizontal agreement among Lessor Defendants. Direct evidence is "tantamount to an acknowledgement of guilt" and "requires *no inferences* to

[2] *In re Automotive Parts Antitrust Litig.*, 2013 WL 2456586, at *3 (E.D. Mich. June 6, 2013) (defendants had pled guilty to bid-rigging); *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016) ("plaintiff has alleged that drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares"); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *3 (N.D. Ohio June 13, 2019) (plaintiffs satisfied heightened particularity requirement); *Markson v. CRST Int'l, Inc.*, 2019 WL 6354400, at *3 (C.D. Cal. Mar. 7, 2019) (plaintiffs pled specific "terms of Defendants' agreement," "communications to maintain and continue the agreement," and "resulting hiring decisions").

establish the proposition or conclusion being asserted." *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014) (emphasis added). Nothing in the SAMC meets that standard.

Plaintiffs' putative "direct evidence" is a hodgepodge of disconnected contentions: (i) that RealPage RMS allowed users to work as a "community" in their pricing; (ii) Defendants "outsourced" daily pricing decisions to RealPage (although they admittedly always retained discretion over pricing); (iii) some Defendants used RealPage price advisory services; and (iv) users switched from an "occupancy focus"—whatever that vague phrase may mean—to a "rent growth" strategy. Opp. at 12–13. Plaintiffs also claim that RealPage encouraged Defendants to create user groups and that some Defendants followed RealPage's pricing recommendations frequently, supposedly leading to rent increases. *Id.* at 13–14. But none of this is an explicit acknowledgement of any horizontal agreement to set rents. *Hyland*, 771 F.3d at 318. Indeed, *Hyland* rejected a contention that statements made by competing real estate brokers at a public hearing were direct evidence of price-fixing—statements far more direct than anything Plaintiffs allege here. *Id.* at 319.[3]

C. Plaintiffs Plead No Plausible Circumstantial Evidence of Conspiracy

i. Plaintiffs Have Not Alleged Parallel Conduct

Plaintiffs fail to allege a "pattern of uniform business conduct" that would support a finding of conspiracy. *Travel Agent*, 583 F.3d at 903.

First, Plaintiffs' graphs do not show "parallel increases in price." Opp. at 16. Instead, they show: (1) increases in average annual asking rents beginning as early as 2013, among *both* Lessor

[3] *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 220 (3d Cir. 2008), does not help Plaintiffs. There, the defendants admitted to "gentleman's agreements" not to compete on price or in each other's territories. *Id.* Likewise, *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 950–51 (N.D. Ill. 2018) alleged an express agreement between defendants. Plaintiffs make no comparable allegations here.

Defendants and *non-defendants* (*see* SAMC ¶¶ 21–22 figs. 1 & 2); and (2) significant variation in rates and direction of rates (up and down) charged by Lessor Defendants year over year. Mot. at 16. Unable to explain how this constitutes parallel pricing, Plaintiffs attack a straw man, claiming that Defendants require Plaintiffs "to allege daily parallel pricing, down to the property level." Opp. at 16. Not so; Defendants argue only that Plaintiffs must allege parallelism in *actual prices* offered by Lessor Defendants (not general trends based on aggregated annual averages). Of course, since Plaintiffs bought "Defendant-specific pricing data" that allowed for a "detailed analysis" and calculation of yearly average pricing (*id.* at 16, 32), they presumably have *actual asking prices* during those years. But they chose not to allege them—much less that Lessor Defendant's actual asking prices moved in parallel—and thus have not alleged the "consistently and nearly simultaneous[]" or "perfectly coordinated " prices they claim. SAMC ¶ 337; *cf. In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 626–30 (E.D. Pa. 2010) (alleging "near-parallel price movements" in same *month*); *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 791 (N.D. Ill. 2017) (two extended periods of production cuts among defendants sufficiently alleged conduct "that took place at the same time").

Second, while claiming they "tied their statistical and economic analysis to other plausible factual allegations about the cartel" (Opp. at 17), they do not cite (or have) any allegations to support this claim.[4] There are no alleged facts to connect Lessor Defendants' separate adoption of distinct RMS products over a 20-year period to any conspiracy. Mot. at 14. Plaintiffs concede

[4] The complaints in Plaintiffs' cases alleged facts to connect challenged conduct to alleged conspiracies. *Cf. In re Local TV Advert. Antitrust Litig.*, 2020 WL 6557665, at *8 (N.D. Ill. Nov. 6, 2020) (direct competitor communications and consent decrees supported allegations of increased prices); *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 59 (D.D.C. 2016) (executives statements close in time about need for capacity discipline accompanied by limited capacity growth).

that before 2016, Lessor Defendants used the software as a legitimate "advisory product," and never explain how use of the software changed thereafter. SAMC ¶ 212. Nor does the SAMC allege that any Lessor Defendant based a purported price increase on a recommendation from RealPage, much less that any two Lessor Defendants followed the same or similar recommendations. Mot. at 16. This is fatal, given that the SAMC acknowledges that Lessor Defendants frequently reject RealPage pricing recommendations. SAMC ¶ 15 (recommendations accepted "up to" 80-90% of the time); *id.* ¶ 286 (noting some lessors' "low acceptance" and "high variance rate"). *See Gibson*, 2023 WL 7025996, at *4 (that defendants were not "required to accept the prices that the . . . pricing software recommends to them[] further undermin[ed] the plausibility of [Plaintiffs'] conclusory allegations that Defendants entered into a conspiracy to charge higher prices by accepting the prices recommended to them by algorithmic pricing software").

Third, Plaintiffs now argue the parallel conduct is not adoption of RealPage RMS, but a "shift" to a "price-over-volume" strategy that "lead to explosive rent growth." Opp. at 15–16, 19. But Plaintiffs' graphs do not show any dramatic change (and certainly no explosive growth) in pricing beginning in 2016; rather, they show gradual increases in average asking rents (for Defendants and non-defendants alike) *beginning in 2013*. *See, e.g.*, SAMC ¶¶ 21 fig.1, 22 fig.2, 339 fig.11; *cf. Kleen Prods. LLC v. Georgia-Pacific LLC*, 910 F.3d 927, 937 (7th Cir. 2018) ("A continuation of a historic pattern . . . does not plausibly allow one to infer the existence of a cartel."). Further, the SAMC never says when any Lessor Defendant shifted to a "price-over-volume" strategy or how this "shift" was "parallel" among them, especially those with "a low acceptance rate of RealPage's pricing recommendations." SAMC ¶ 286. And Plaintiffs' claim that they do not have to show "simultaneous action" misses the mark. Opp. at 16. They allege *no* specific actions by each Lessor that would support an inference of conspiracy, in stark contrast to

the cases Plaintiffs cite.[5]

ii. Plaintiffs Do Not Plausibly Allege "Plus Factors"

A plaintiff pleads a conspiracy only by alleging facts "tending to exclude the possibility of independent conduct." *Hobart-Mayfield, Inc. v. Nat'l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 664 (6th Cir. 2022). Plaintiffs are wrong that "innocent explanations" for Defendants' actions are irrelevant. Opp. at 11 nn.14 & 23. "[W]hen factual allegations [are] at most consistent with both conduct that is actionable and conduct that is not, more is required to 'nudge the claims across the line from conceivable to plausible.'" *Deom v. Walgreen Co.*, 591 F. App'x 313, 320 (6th Cir. 2014) (quoting *Twombly*, 550 U.S. at 570) (cleaned up). None of Plaintiffs' alleged plus factors tend to exclude independent conduct.

Information Sharing: Plaintiffs admit RealPage does not share one competitor's transaction data with other competitors. Opp. at 24–25. But they contend this does not matter because RealPage used Lessors' transaction-level data to "set collusive prices *on behalf* of the other" Lessors. *Id.* This argument has no basis in the SAMC. Plaintiffs acknowledge RealPage does not "set" any prices—it recommends prices that Lessor Defendants individually decide to accept or reject. Mot. at 4–5; *see also* SAMC ¶ 13. Nor could RealPage's alleged use of Lessors' data to generate price recommendations—including price *decreases*—be a plus factor: it is alleged to be a feature of RealPage's RMS that helps Lessors maximize revenues (SAMC ¶ 252), a goal that serves each Lessor Defendant's independent self-interest. *Cf. In re Local TV Advert. Antitrust*

[5] *Interstate Circuit*, 306 U.S. at 221–22 (distributors imposed minimum price after receiving same letter demanding it); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 420 (4th Cir. 2015) (defendants met and in "a matter of months" refused to work with plaintiff); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 190–91 (2d Cir. 2012) (defendants ceased dealing with plaintiff within days of each other); *In re Diisocyanates Antitrust Litig.*, 2020 WL 1140244, at *3 (W.D. Pa. Mar. 9, 2020) (alleging "coordinated parallel conduct, price increases, plant closures and supply disruptions" and communications "prior to pricing announcements").

Litig., 2022 WL 3716202, at *6 (N.D. Ill. Aug. 29, 2022) (dismissing claims that defendant used competitor data in product that "helped companies adjust prices in response to market behavior to maximize their profits" (cleaned up)).

Plaintiffs' concession that "transaction-level data" is not shared with competitors (Opp. at 25) also undermines Plaintiffs' reliance on *TV Advertising*. There, "conduits" allegedly provided *competitor-specific* data to all competitors, which "facilitated the [competitors'] ability to exchange competitively sensitive information *with one another*." *TV Advert.*, 2020 WL 6557665, at *9. Plaintiffs admit that is not true here. *Cf. Gibson*, 2023 WL 7025996, at *6 (providing data to software vendor not a plus factor absent allegations that hotels "exchange nonpublic information *with each other* through their use of that same software" (emphasis added)).

While Plaintiffs assert that RealPage discloses information during quarterly "PTM" meetings (Opp. at 25), the SAMC itself concedes that RealPage at most shares only "pooled" or "blended" data at those meetings (SAMC ¶¶ 239–47). Similarly, general allegations that RealPage encouraged Lessors to exchange information (Opp. at 25) do not allege a years-long price-fixing agreement. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). And alleging that lessors can "choose" which data is used in recommending prices (Opp. at 25) does not indicate that any lessor had any competitor-specific data allowing them to police an agreement.

Actions Against Self-Interest: Lessor Defendants supposedly acted against their self-interest by "prioritizing rent increases" and "restricting supply" rather than focusing on occupancy. Opp. at 21–22. Yet Plaintiffs do not actually allege that Defendants restricted supply—instead, the sources the SAMC cites show the software's ability to *reduce* vacancies. Mot. at 17. Regardless, increasing prices is consistent with unilateral efforts to maximize revenue, which Plaintiffs concede is the software's aim. Opp. at 22 (RealPage "helped [Lessors] . . . maximize

revenues"). Companies may increase prices at the expense of quantity to maximize profits. *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 49–50 (9th Cir. 2022) ("economically rational" to "focus on profitability" instead of market share.). That RealPage allegedly "pushes you to go to places that you wouldn't have gone if you weren't using it" does not imply "collective action" (Opp. at 21); it is consistent with rational individual actions to "maximize revenues."

Nor is *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004) to the contrary. Opp. at 21. There, "no evidence" correlated "the increase in list prices . . . with any changes in costs or demand." *Flat Glass*, 385 F.3d at 362. Here, Plaintiffs' own figures show average rent increases both before and after the putative conspiracy began. *See, e.g.*, SAMC ¶¶ 21 fig.1, 22 fig.2, 339 fig.11. Industry-wide price increases, starting *before* any alleged conspiracy, do not suggest collusion. *See Kleen*, 910 F.3d at 937; *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1197 (9th Cir. 2015). And none of Plaintiffs' cases suggest such price increases are against Lessors' unilateral self-interest.[6]

Other Alleged Plus Factors: Plaintiffs' remaining alleged plus factors are, at most, neutral and consistent with independent conduct. The alleged motive to collude—to "increase revenues by up to 7%" (Opp. at 23)—is a "legitimate understandable motive to increase profits." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 137 (3d Cir. 1999). Plaintiffs fail to allege who participated in any of the supposed "face-to-face meetings" and "trade associations" that Plaintiffs deem

[6] *See In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015) (direct exchange of highly sensitive price information can be plus factor); *Meyer*, 174 F. Supp. 3d at 824 (drivers' contracting with Uber with "clear understanding that all other Uber drivers are agreeing to charge the same fares" supports inference of agreement); *Tichy v. Hyatt Hotels Corp.*, 376 F. Supp. 3d 821, 836 (N.D. Ill. 2019) (parallel decision to stop bidding on competitors' keywords suggested they irrationally relinquished "opportunities to take business away from" others).

"opportunities to collude" (Opp. at 23–24), but even if they did, such allegations are consistent with proper business activities and reflect the lawful purpose of trade associations. *See Travel Agent*, 583 F.3d at 910–11 ("[G]ather[ing] at industry trade association meetings" is "more likely explained by . . . lawful, free-market behavior"). That RealPage allegedly presented on "rent price optimization" and using revenue management "to set above-market pricing" (Opp. at 24) are similarly consistent with Lessors' individual efforts to increase revenues. *See Musical Instruments*, 798 F.3d at 1196 ("[M]ere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest [conspiracy]."). Finally, Plaintiffs' generic allegations about various putative submarkets—with high entry barriers, inelastic demand, and fungibility (Opp. at 25–26)—"are simply descriptions of the market, not allegations of anything that the defendants did." *Erie Cnty. v. Morton Salt, Inc.*, 702 F.3d 860, 870 (6th Cir. 2012).

D. The Rule of Reason Applies

Because "[i]t is a bad idea to subject a novel way of doing business . . . to per se treatment" (*In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1008 (7th Cir. 2012)), the Sixth Circuit's "automatic presumption in favor of the rule of reason standard" applies here. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014) (quotation marks omitted). Plaintiffs argue that "[c]ourts are perfectly familiar with price-fixing" and RMS is merely the "machinery employed" here. Opp. at 7. But calling the use of software "price-fixing" does not make it so, especially when Plaintiffs acknowledge that such use is in each Defendant's unilateral interest. *See* Mot. at 17–18; *see also* SAMC ¶ 300. Nor is it correct, as Plaintiffs contend, that an alleged restraint's "purpose and effect . . . dictate the mode of analysis" regardless of judicial experience with it. Opp. at 7. Plaintiffs' cases involved naked horizontal agreements courts have long deemed *per se*

illegal.[7]

Even if Plaintiffs had plausibly alleged horizontal collusion through vertical agreements[8]—they do not—the rule of reason would apply. *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007); *Toledo*, 530 F.3d at 225. Nor do *TRU*, *Apple*, and *Interstate Circuit* suggest otherwise. *Leegin*, 551 U.S. at 893–94 (citing *TRU* as an example of a vertical arrangement subject to the rule of reason); *Apple*, 791 F.3d at 323 (*per se* rule applies to allegations of a "horizontal agreement that Apple organized among the Publisher Defendants," not to Apple's "vertical" agreements with each publisher). *Interstate Circuit* was not a *per se* case. 306 U.S. at 230–32, 232; *see Royal Drug Co. v. Grp. Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984) (the "analysis [in *Interstate Circuit*] was predicated upon the rule of reason").

i. Plaintiffs Fail to Allege a Plausible Relevant Market

Plaintiffs' MSA-based submarkets fail. As an initial matter, Plaintiffs ignore *United States v. Conn. Nat'l Bank*'s admonition that an antitrust plaintiff "cannot rely, without more, on Standard Metropolitan Statistical Areas ("MSAs") as defining the geographic markets," including because they may not be "sufficiently refined" and thus lead to "inaccuracies." 418 U.S. 656, 670 (1974). Plaintiffs' proposed markets only underscore the problem. For example, Plaintiffs' alleged Tennessee submarket implausibly assumes a renter in Robertson County would view an apartment 85 miles away in Maury County as substitutable. *See* SAMC ¶ 410. Plaintiffs try to minimize the

[7] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) (horizontal agreement to set "floor" for gasoline prices); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648–49 (1980) (agreement to fix credit terms); *Apple*, 791 F.3d at 327 (horizontal group boycott); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) (agreement to fix interest rates); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 339 (1982) (agreement to fix maximum fees charged).

[8] To the extent Plaintiffs argue vertical relationships are confined to the distribution context (Opp. at 8), they are wrong. *Brillhart v. Mutual Med. Ins., Inc.*, 768 F.2d 196, 199–200 (7th Cir. 1985) (agreement between buyer and sellers was vertical; collecting cases).

issue, characterizing it as a mere dispute over "whether a renter in the New York, NY submarket would consider . . . Jersey City, NJ as an adequate substitute." Opp. at 34. But the MSA markets alleged are far broader—indeed Plaintiffs allege that the New York rental market extends into *Pennsylvania*. *See* SAMC ¶ 522. Plaintiffs' markets are implausible.

Plaintiffs' claim that courts have recognized MSAs as relevant geographic markets also fails. Opp. at 34. They rely on two cases alleging that MSAs were relevant healthcare markets because patients could seek alternative healthcare providers in the same region—a much different issue than *housing*. *See id.* at 35 n.33 (citing *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 673 (E.D. Mich. 2011); *In re Blue Cross Blue Shield Antitrust Litig.*, 2017 WL 2797267, at *11 (N.D. Ala. June 28, 2017)). The same goes for Plaintiffs' reliance on the SSNIP test. Agencies use that standard to determine the "smallest area" in which a hypothetical monopolist "that controls all the suppliers in a proposed market" could profitably increase prices. *Se. Milk*, 739 F.3d at 277–78. Here, Plaintiffs did not start with the narrowest possible market, as required; they started with expansive geographic areas because they were MSAs.

Plaintiffs are also wrong that an overbroad market definition does not warrant dismissal. Opp. at 35. Courts dismiss claims premised on overbroad markets. *E.g.*, *Uretek USA, Inc. v. Applied Polymerics, Inc.*, 2011 WL 6029964, at *5 (E.D. Va. Dec. 5, 2011); *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 2015 WL 1969380, at *6 (D.N.J. Apr. 29, 2015).

ii. Plaintiffs Fail to Allege Anticompetitive Effects

Plaintiffs plead neither direct nor indirect allegations of anticompetitive effects. Regarding direct allegations, Plaintiffs' arguments about "an increase in rental prices" fail. Opp. at 31–32. Plaintiffs' alleged analyses show only that some Lessor Defendants' aggregate average prices went up year-over-year (*see, e.g.*, SAMC ¶ 22 fig.2), while at the same time, average prices for *all*

lessors (not just Defendants) went up, including during a period of historic inflation (*see, e.g.*, SAMC ¶ 21 fig.1). Allegations that average prices went up for *all lessors* do not support a plausible inference that Lessor Defendants' prices were supracompetitive (instead, they show Lessor Defendants' pricing was in line with market prices). *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993).[9] Nor do statements about increasing *revenue* help Plaintiffs. Revenue is not price, and the software can, *inter alia*, increase revenue by reducing vacancies (or prices). Mot. at 33–34.

Plaintiffs have not pleaded plausible indirect allegations either. Central to Plaintiffs' market-share calculations is the claim that RealPage has a two-thirds share of "the RMS market." *E.g.*, SAMC ¶ 412. That claim is based on a misreading of an investor transcript cited in the SAMC. Mot. at 35–36. While Plaintiffs claim the Court must credit the "inference" they draw from that transcript (Opp. at 37 & n.36), the Court is not "bound to accept . . . unwarranted inferences, including allegedly inferable 'facts' or conclusions which contradict documentary evidence appended to, or referenced within, the plaintiff's complaint." *Blankenship v. City of Crossville*, 2017 WL 4641799, at *2 (M.D. Tenn. Oct. 17, 2017). And Plaintiffs do not explain how a transcript that says RealPage and one other competitor together accounted for only *thirty percent of RMS users* supports an inference that RealPage has *sixty-six percent* of the alleged RMS market.[10]

[9] Plaintiffs argue that they are not required to "prove" supracompetitive pricing until trial. Opp. at 32–33. That may be, but they must plausibly *allege* it now. *See Comcast Corp. v. Nat'l Ass'n African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (a plaintiff must plead "at the outset of a lawsuit . . . what [it] must prove in the trial").

[10] Plaintiffs also seek to rely on the SSNIP test to show market power (Opp. at 36–37), but that *hypothetical* test reveals nothing about Lessor Defendants' market shares.

E. Plaintiffs Fail to Plead Facts Showing Antitrust Standing

Plaintiffs concede they do not meet the "threshold" requirement of antitrust standing. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007). They admit they do not allege that *any* rent they paid to *any* Lessor Defendant was set using RealPage RMS products. Opp. at 37–38. This is fatal. Although Plaintiffs argue they "could not be reasonably expected to know [this], at the pleading stage" (*id.*), they cite no authority excusing them from alleging *antitrust injury*—i.e., that at least *one* of the rents *each* Plaintiff paid was set via the purportedly anticompetitive mechanism of the alleged conspiracy. That pleading obligation is important here because Plaintiffs admit Lessor Defendants reject RMS recommendations *at least* 10–20% of the time (SAMC ¶ 15), and that some do so often (SAMC ¶ 286). Thus, Plaintiffs fail to allege any link between their own rents and the challenged conduct.

F. Plaintiffs' State-Law Claims Fail

Plaintiffs misstate their claims and the law. They argue Section 9.2 of Pennsylvania's UTPCPL "provides 'a private remedy for all violations . . . which might otherwise escape remedy'" (Opp. at 38 n.38 (alteration in original)), but the case they rely on cabins that private remedy to "*violations of Section 3*" of the UTPCPL (*In re Smith*, 866 F.2d 576, 583 (3d Cir. 1983)), which does not proscribe antitrust violations. 73 Pa. Stat. § 201-3. Plaintiffs argue Georgia recognizes a common-law tort for restraint of trade, but sought relief under Georgia's statute, which they concede doesn't allow a private right of action. SAMC ¶ 721. Plaintiffs try to distinguish *Trails End Campground, LLC v. Brimstone Recreation, LLC*, 2015 WL 388313 (Tenn. Ct. App. Jan. 29, 2015), but the court held that the TTPA does not apply to a "lease of property." *Id.* at *11. Plaintiffs ignore South Carolina Code § 39-3-30, which limits claims "*described in Section § 39-3-10*" (which Plaintiffs sued under) *to goods*. S.C. § 39-3-30 (emphasis added). Plaintiffs also

claim they did not need to send the pre-suit demand letter required by Massachusetts law because they made claims under Section 11, but that provision applies only to business claims. *Rhodes v. Ocwen Loan Servicing, LLC*, 44 F. Supp. 3d 137, 143 (D. Mass. 2014).

Plaintiffs do not dispute that certain state-law claims are time-barred, but argue those issues "generally" should not be decided on a motion to dismiss. Opp. at 40. But dismissal is appropriate where "the allegations in the complaint affirmatively show that the claim is time-barred." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) (affirming dismissal of time-barred claims).

Finally, Plaintiffs say they have standing to assert claims under the laws of states where they neither lived nor were injured, but *Fox v. Saginaw Cnty.*, 67 F.4th 284 (6th Cir. 2023), held that named plaintiffs cannot rely on absent class members for standing; *representative plaintiffs* must have standing *for each claim* they bring. *Id.* at 295. Plaintiffs do not.

II. CONCLUSION

The Court should dismiss Plaintiffs' claims with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 22nd day of November, 2023.

/s/ *Jay Srinivasan*
Jay Srinivasan